IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 21-3091

ERICH SMITH, FRANK E. GARWOOD, MARIBEL LORENZO, AND DR. DANIEL DONOFRIO,

Plaintiffs-Appellants

v.

President JOSEPH R. BIDEN, in his official capacity and any successors for the Office of President,
Defendant-Appellees,

On appeal from the United States District Court of New Jersey's denial of a preliminary injunction pursuant to *Fed. R. Civ. P.* 65

APPELLANT'S BRIEF IN SUPPORT OF REVERSE AND REMAND FOR ENTRY OF A PRELIMINARY INJUNCTION

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SUBJECT MATTER & JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the claims in this case because they involve questions concerning the substantive due process clause of the Fifth Amendment to the U.S. Constitution, specifically: 1) whether the President may condition federal employees' continued employment on submitting to a medical procedure and 2) whether the President can order private businesses with which the federal government contracts to condition their employees' continued employment on the employees submitting to a medical procedure.

The District Court erred in finding that it did not have jurisdiction over Plaintiff Maribel Lorenzo's claims. This is one of the issues presented for review.

The Court of Appeals has subject matter jurisdiction due to the Constitutional issues raised and pursuant to 28 *U.S.C.* §1292(a)(1), which provides that the Court of Appeals has jurisdiction from interlocutory orders refusing an injunction.

On November 8, 2021, District Court Judge Christine P. O'Hearn filed an opinion and order denying Plaintiffs' motion for a preliminary injunction. The Notice of Appeal was filed on November 10, 2021.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that "there is no fundamental right to refuse a Covid-19 vaccine?"

2. Whether the District Court erred in holding that the President has authority under Title V to require federal employees be injected with a pharmaceutical as a condition of continued employment?
3. Whether the District Court erred in declining to exercise jurisdiction over Plaintiff Maribel Lorenzo?
4. Whether the District Court erred in denying injunctive relief?

STATEMENT OF RELATED CASES PURSUANT TO L.A.R. 28.1(a)

This case has not previously been before the Third Circuit. There are other cases concerning President Biden's Mandates being litigated throughout the country. Plaintiffs are not parties to any other litigation concerning the Mandates.

STATEMENT OF THE CASE

This case arises from two executive orders signed by President Joseph R. Biden on September 9, 2021. Both orders mandate that American workers be injected with specific pharmaceuticals as a condition of continued employment. Executive Order 14042 pertains to all employees who work for a business that has contracts or subcontracts with the federal government. ("The Contractor Mandate") (Appellant's Appendix[1] "Appellant App." at 37-40). Executive Order 14043

[1] Appellants' counsel emailed Appellee's counsel on November 10, 2021 (the day the Notice of Appeal was filed) to inquire about a joint appendix, but given the

pertains to federal employees. ("The Employee Mandate," Appellant's App. at 55-56). Three Plaintiffs, Erich Smith, Frank E. Garwood, and Daniel Donofrio, are federal employees subject to the Employee Mandate. (ECF 2, "Amended Complaint" at ¶ ¶92, 93, 95). The federal employee plaintiffs all worked in person through the pandemic without a vaccine or testing. *Id.* One Plaintiff, Maribel Lorenzo, works for Horizon Bluecross Blueshield and is subject to the Contractor Mandate. *Id.* at ¶94. Collectively, the Plaintiffs/Appellants are referred to herein as "the Workers."

The Workers filed a Complaint for declaratory and injunctive relief on October 29, 2021, however the wrong draft was initially uploaded. (ECF No. 1). The Workers filed an Amended Complaint two hours later with the correct draft. (ECF No. 2). On November 3, 2021, the Workers filed a request for a Temporary Restraining Order and/or Preliminary Injunction pursuant to *Fed. R. Civ. P.* 65. (ECF No. 4). On November 4, 2021, District Court Judge Christine P. O'Hearn issued an Order to Show cause ordering a briefing schedule and for President Biden to appear on November 8, 2021 and show cause as to why he should not be enjoined from enforcing Executive Orders 14042 and 14043. (ECF No. 6). The U.S. Attorney's Office for the District of New Jersey filed a brief opposing the preliminary injunction

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expedited nature of the action, one was not agreed upon in time for the opening brief.

on Friday, November 5th. (ECF No. 9). In its brief, the government raised the argument that the President cannot be enjoined and that Plaintiffs' action is barred by sovereign immunity.

Plaintiffs filed a reply on Saturday, November 6th. (ECF No. 12). Also on November 6th, Plaintiffs' filed a motion for leave to file a Second Amended Complaint pursuant to *Fed. R. Civ. P.* 15. (ECF No. 13). The proposed Second Amended Complaint adds Merrick B. Garland, in his official capacity as Attorney General of the United States, Kilolo Kijakazi in her official capacity as Acting Commissioner of the Social Security Administration, and The United States of America as Defendants. The purpose of the Second Amended Complaint was to resolve objections raised by the government in its opposition brief that the District Court may not directly enjoin the President. The Second Amended Complaint also added a claim for violation of Plaintiffs' Fifth Amendment right to equal protection under the law. On November 7th, Plaintiffs filed a motion to expedite the motion for leave to file a Second Amended Complaint. (ECF No. 14).

On Monday November 8, 2021 Judge O'Hearn held a hearing. Judge O'Hearn entered an opinion on November 8, 2021 and an Order denying Plaintiffs' request for injunctive relief on November 9, 2021. (ECF Nos. 19, 20).

On November 10th, the District Court set a December 6th return date for both the motion for leave and the motion to expedite the motion for leave. On November

12, 2021 Magistrate Judge Sharon A. King denied Plaintiffs' motion to expedite as moot. On November 19, 2020 the Motion for Leave to Amend was reset to December 20, 2021 at the government's request.

STATEMENT OF FACTS

A. The Mandates

On September 9, 2021 President Joseph R. Biden ("the President") gave a national speech claiming authority to require two-thirds of the entire American workforce to undergo injection with a novel pharmaceutical as a condition of continued employment. ("The President's Speech", Appellant's App. at 65-70). The President divides the workers over which he claims authority into four groups with a different claimed source of authority for each group. The four groups of workers and claimed source of authority over each are as follows: 1. for federal government employees the President cites Title 5A as authority (Appellant's App. at 55); 2. for people who work for a corporation that is connected at any tier to a federal government contract he cites procurement law and 3 *U.S.C.* §301 (Appellant's App. at 41); 3. for people who work in corporations larger than 100 people he claims authority through the Occupational Safety Hazard Act (Appellant's App. at 66); and 4. for people who work for healthcare institutions, he claims authority through funding for Medicare and Medicaid. *Id.* This lawsuit concerns the first two groups, federal employees and federal contractors.

1. The Employee Mandate

Executive Order 14043 ("EO 14043") requires all executive branch federal employees to undergo either one injection of a DNA viral vector pharmaceutical manufactured by Johnson and Johnson subsidiary Janssen or two injections of mRNA pharmaceuticals manufactured by Pfizer Inc. ("Pfizer") or Moderna. (Herein the process of injection is referred to as "the mandated medical procedure" and the pharmaceuticals to be injected are referred to as "the mandated pharmaceuticals"). Pursuant to the Executive Order, the President's "Safer Workforce Task Force" updated existing Covid-19 "Agency Model Safety Principles" to guide agencies on how to implement EO 14043. ("Employee Taskforce Guidelines", Appellant's App. at 57-64). The Employee Taskforce Guidelines state that "[a]gencies must work expeditiously so that their employees are fully vaccinated as quickly as possible and by no later than November 22, 2021." *Id.* at 57. The Employee Mandate allows only "legally required exceptions" in "limited circumstances." *Id.* To apply for an exception Employees must provide the government with private medical information and/or information about their religious beliefs for the government to decide if an exception is legally required. Employees who are granted an exception are subject to medical surveillance through twice weekly medical testing. *Id.* at pg. 59-60. They are required to cover their faces when at work and are required to physically segregate themselves from other people. *Id.*

The claimed authority for EO 14043 is 5 U.S.C. § §3301, 3302, and 7301, discussed more fully herein in Part II.

2. The Contractor Mandate

Executive Order 14042 titled "Ensuring Adequate COVID Safety Protocols for Federal Contractors" ("EO 14042," Appellants' App. at 37-40) requires all workers employed by a business that holds a service contract or subcontract with the federal government to undergo the same mandated medical procedure as federal employees. On September 24, 2021, pursuant to EO 14042, The President's Task Force issued guidance titled "COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors" for federal departments on how to implement EO 14042. *The Contractor Task Force Guidance* (Appellants' App. at 57-64).

The Contractor Mandate has an unusual implementation mechanism. It requires all federal contracts, contract-like instruments, and sub-contracts to any federal contract to contain a clause that the contractor "shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force." (EO 14042, Appellants' App. at 37). Once the contract clause is ratified, it outsources enforcement of the Mandate to private businesses, stating: "[c]overed contractors are responsible for ensuring that covered contractor employees comply with the workplace safety protocols…" (Contractor Task Force Guidance, Appellant's App.

at 45). The end result is that the federal government and private employers have entered into a contract concerning the bodies of private sector workers. Notably, the guidelines are subject to change "as warranted by the circumstances of the pandemic and public health conditions." *Id.* at 42. This leaves open the possibility that more medical procedures could be mandated if the Centers for Disease Control updates its definition of "fully vaccinated" as CDC Director Rochelle Walensky has stated could happen. (Appellants' App. at 128, CDC Director Rachel Walensky quoted as saying "[w]e may need to update our definition of 'fully vaccinated' in the future").

Currently the Contractor Taskforce Guidelines require all contractors and subcontractors to agree to three "workplace safety protocols."

> 1. Covid-19 vaccination of covered contractor employees except in limited circumstances where an employee is legally entitled to an accommodation;
> 2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
> 3. Designation by covered contractors of a person or persons to coordinate Covid-19 workplace safety efforts at covered contractor workplaces.

(Appellants' App. at 41). The claimed authority for EO 14042 is "the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code." (EO 14043, Appellant's App. at 37). The Federal Property and Administrative Services Act relates to procurement. The government has not

indicated what specific language in that statute purportedly gives the President authority to condition federal contracts on contractors' employees undergoing medical procedures.

The other provision cited for authority, 3 *U.S.C.* §301, provides that:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

It is not apparent from the Executive Order, the Task Force guidelines, the government's papers below, or the plain language of the statutes what specific language the President claims gives him authority to condition federal contracts on private employees of contractors undergoing a medical procedure.

The Contractor Mandate is very broad. It even requires people who work fully remotely to undergo the mandated medical procedure. The Task Force Guidance states:

> An individual working on a covered contract from their residence is a covered contractor employee, and must comply with the vaccination requirement for covered contractor employees even if the employee never works at either a covered contractor workplace or Federal workplace during the performance of the contract.

(Appellant's App. at 51) It also applies to people who are already immune to Covid-19, and people who are not themselves involved with a federal contract even

tangentially, but happen to work in the same location as people who are connected with a federal contract. (*Id.* at pg. 50-51).

3. The Workers

Plaintiff/Appellants Erich Smith and Frank Garwood work for the Department of Justice in the Department of Corrections and are subject to the Employee Mandate. Dr. Daniel Donofrio works for the Social Security Administration and is subject to the Employee Mandate. (ECF No. 2, "Second Amended Compl."at ¶ ¶92, 93, 95). All three federal employee plaintiffs worked in-person through all or most of the pandemic without testing or a vaccine. *Id.* Plaintiff Maribel Lorenzo works for a private health insurance company (Horizon BlueCross BlueShield) that has contracts with the federal government. She is subject to the Contractor Mandate. *Id.* at ¶94. The Workers do not want to undergo the mandated medical procedure for a range of personal reasons. All have been good employees for the government and their employers. *Id.* at ¶¶92-95.

STANDARD OF REVIEW

The standard of review on all issues is plenary because they involve solely legal questions. *Maldonado v. Houstoun*, 157 F.3d 179, 183–84 (3d Cir. 1998) (stating that "[o]n appeal, when considering the district court's grant of a preliminary injunction, we review the court's legal conclusions de novo, its findings of fact for clear error, and its ultimate decision to grant or deny

the preliminary injunction for an abuse of discretion…Because this appeal presents solely legal questions…our review is plenary").

SUMMARY OF THE ARGUMENT

1. The Mandates are unconstitutional

The President does not have the authority to impose these Mandates. The President cites several statutes as claimed sources of authority, but nothing in the plain language of the statutes even hints that Congress intended to imbue the President with the authority to condition people's employment on undergoing medical procedures. Moreover, even if Congress did have such an intent, it still would have been impermissible because health laws are the province of state police power, a type of power from which the federal government, including Congress, is specifically excluded. Finally, even if the President were able to claim this authority in some way, these specific Mandates violate the Workers' fundamental rights to liberty and privacy, recognized by the substantive due process clause of the Fifth Amendment to the U.S. Constitution.

The right of free people to decline unwanted medical procedures is a fundamental right supported by Supreme Court precedent under bodily integrity. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating that "[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the

rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion"); *see also, Cruzan by Cruzan v. Dir., Missouri Dep't of Health,* 497 *U.S.* 261, 277 (1990) (stating that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment"). The Mandates also intrude on the fundamental right to privacy.

Because the Mandates intrude on fundamental rights, they should be analyzed with strict scrutiny. *Harris v. McRae*, 448 *U.S.* 297, 312 (1980) (stating that "[i]t is well settled that...if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional"); *see also*, *Regents of Univ. of C*alifornia v. *Bakke*, 438 *U.S.* 265, 357 (1978) (stating that "a government practice or statute which restricts 'fundamental rights'…is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available").

The Mandates fail under strict scrutiny because the individual rights to liberty and privacy outweighs the government's interests for reasons discussed in at Part IV. The Mandates also fail because they are not narrowly tailored. The Fifth Circuit Court of Appeals recently stayed the OSHA Mandate, which requires all employees who work for a business with more than 100 employees to undergo the mandated

medical procedure. In staying the Mandate, the Fifth Circuit Court of Appeals pointed to the Mandate's overbreadth:

> The Mandate is staggeringly overbroad. Applying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself, the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees. All else equal, a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on, but one constant remains –the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.

BST Holdings, L.L.C. v. OSHA, 2021 WL5279381 at *6 (5th Cir. November 12, 2021) (emphasis in original). The Mandates at issue here suffer the same infirmities.

2. The District Court's Error

The District Court misread the holding in the Supreme Court case *Jacobson v. Massachusetts* 197 *U.S.* 11 (1905). The actual holding is straightforward and narrow. It states: "[W]e hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." *Jacobson v. Massachusetts*, 197 *U.S.* 1, 25 (1905) (emphasis added). The District Court misread the *Jacobson* holding as being much broader. ("District Court Opinion," Appellants' App. at 20) (stating that *Jacobson* "held that the State had the right to impose vaccine mandates"). The Court did not compare the facts of the statute upheld in *Jacobson* and the Mandates to see if the cases are actually analogous. They are not. In fact they

are almost inapposite, especially insofar as *Jacobson* was analyzed in the context of state police power, a power that the federal government does not possess. Instead of recognizing *Jacobson*'s many points of distinction from these Mandates, the Court relied on *Jacobson* to hold that "there is no fundamental right to refuse a Covid-19 vaccine." *Id.* at 19. This constitutes a radical expansion of *Jacobson's* holding. Based on its holding that there is no fundamental right to refuse a Covid-19 vaccine, the District Court then erroneously applied rational basis analysis to the Employee Mandate when analyzing it under Title V.

Separately, the court also erred in holding that Title V does (or can) give the President authority to institute the Employee Mandate.[2] There is no obvious language in the statutes that suggests this authority, and the government has not cited what specific language in the statutes or the Constitution it believes give the President this authority. Additionally, the Mandates concern a matter of public health, which falls under the police power reserved to the states and from which the federal government is explicitly excluded. As Chief Justice Roberts summarized in 2014:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have

[2] The Court did not analyze the Contractor Mandate because it held that it lacked jurisdiction over the claims. However, the analysis between the two Mandates is functionally the same. The Mandates are unconstitutional because: 1) the President lacks the authority for the Mandates and 2) the Mandates violate the Workers' rights to liberty and privacy as detailed in *infra* in Part IV.

> broad authority to enact legislation for the public good—what we have often called a "police power." *United States v. Lopez,* 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it," *McCulloch v. Maryland,* 4 Wheat. 316, 405, 4 L.Ed. 579 (1819).

Bond v. United States, 572 U.S. 844, 854, 134 S. Ct. 2077, 2086, 189 L. Ed. 2d 1 (2014). The fact that the states possess this power and that the federal government does not is an important feature of federalism. The independent power of the States serves as a check on the power of the federal government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 536 (2012) (quoting *Bond v. United States,* 564 U.S. 211, 222 (2011)). The President does not have statutory or constitutional authority to institute the mandates.

Finally, the Court erred in holding that it lacks jurisdiction over Maribel Lorenzo because her claims are redressable in equity, discussed in Part V.

ARGUMENT

I. The District Court erred in holding that *Jacobson* is binding precedent that means that "there is no fundamental right to refuse a Covid-19 vaccine"

Standard of Review

The standard of review on this issue is *de novo* because it involves solely legal questions. *Maldonado v. Houstoun*, 157 F.3d 179, 183–84 (3d Cir. 1998)

Argument

The District Court erroneously characterized *Jacobson's* holding, stating that in *Jacobson* the Court "held that the State had the right to impose vaccine mandates."[3] However, this was not *Jacobson's* holding. The *Jacobson* holding was much narrower: "[W]e hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." *Jacobson v. Massachusetts*, 197 *U.S.* at, 25 (emphasis added). Moreover, the *Jacobson* Court was clear that the "reasonable and proper exercise of the police power" to which it referred was "reasonable regulations established directly by legislative enactment." *Id.* (emphasis added). The statute that the Court held constituted a "reasonable" exercise of the police power allowed for the imposition of a $5 fine after the due process of a trial for someone who declined smallpox inoculation. The Supreme Court did not say that Mr. Jacobson did not have a fundamental right to decline the smallpox vaccine. Rather, it said that the statute was a reasonable exercise of the state's police power to impinge on Mr. Jacobson's liberty. The Court's reasoning took place *in the context* of the state exercising its police power. All of its findings and holdings are within that context. The holding cannot be plucked out of that context and grafted onto the federal government to imbue it with the same police powers the states hold.

[3] The term "vaccine mandate" is suddenly everywhere, but it is actually a fairly new addition to the lexicon and is ill-defined because it could encompass a range of "mandates." The term "vaccine mandate" did not appear in *Jacobson*.

The Court did not compare the statute upheld in *Jacobson* and the Mandates at issue here to see if the cases are actually analogous. They are not. Some of the many ways in which the statute in *Jacobson* is distinguishable from the Mandates here are: 1) the Mandates are not direct legislative enactments, 2) the Mandates were not enacted pursuant to police power of a state, 3) Covid-19 is not as deadly as smallpox, which had a mortality rate of 30%[4], 4) the mandated pharmaceuticals have existed for less than 2 years while the smallpox vaccine had existed for more than 100 years when *Jacobson* was decided, a fact the Court specifically relied upon in its reasoning (*Id.* at 23-34), and 5) the "reasonable" consequences for Mr. Jacobson declining the smallpox vaccine under the Massachusetts statute was a modest fine while the Mandates here deprive people of their means of income and relegate them to a broadly unemployable caste of people.

Finally, it was error to assume that *Jacobson* allows the government to mandate a pharmaceutical simply because it has been labeled a "vaccine" by the FDA. The determination to apply *Jacobson* depends entirely on the mandated pharmaceutical having been labeled a "vaccine" instead of a drug or something entirely new due to the new technology. Thus, the question of whether the mandated pharmaceuticals are the same as "vaccines" within the meaning of *Jacobson* should be a threshold inquiry before determining that *Jacobson* applies.

[4] https://www.cdc.gov/smallpox/clinicians/clinical-disease.html

The government's argument that the mandated pharmaceuticals are vaccines is based on nothing more than the fact that the FDA labeled them so. However, both the Supreme Court and Third Circuit Court of Appeals have noted that courts must look at substance over form and are not bound by agency classifications. *Azar v. Allina Health Servs.*, 139 *U.S.* 1804, 1812 (2019) (noting that "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label."* (emphasis in original); *see also*, *State of New Jersey v. Dep't of Health and Hum. Servs.*, 670 F.2d 1262 (3d Cir. 1981) (stating that "a court of appeals is obligated to look beyond the label the Secretary puts on his or her actions, and instead is required to conduct an independent evaluation of the underlying substance" because "[t]o do otherwise would be to elevate form over substance and...make the jurisdiction of a court of appeals contingent upon the Secretary's unfettered discretion"). More than 100 years separate the precedential case law and the subsequent classification of these pharmaceuticals as falling within that case law. The products at issue are substantially different and the meaning of the word "vaccine has changed significantly. The government has not set forth a definition of "vaccine" that includes these pharmaceuticals and has not shown that *Jacobson* should apply to them.

The Court erred in disregarding all of these distinctions to find *Jacobson* applicable and further erred in misreading *Jacobon's* holding to be as broad as "the

State has the right to impose vaccine mandates." Finally, the Court erred in extrapolating the misread holding to mean that "there is no fundamental right to decline a Covid-19 vaccine." The right to decline the mandated pharmaceuticals is a fundamental right.

II. The District Court erred in holding that Title V gives the President the authority to require all federal employees to undergo a medical procedure as a condition of continued employment

Standard of Review

The standard of review on this issue is *de novo* because it involves solely legal questions. *Maldonado*, 157 F.3d at183–84.

Argument

There is nothing in the plain language, executive order history, or legislative history of 5 U.S.C. §3301, 3302, and 7301 that suggests the President has the authority to condition federal employment on undergoing a medical procedure. The President cannot assert authority under §3301 as to the federal employees because that section relates to hiring and applicants, not current employees. It provides that the President may:

> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section 5 U.S.C.A. § 3301 (West)

§3301 (emphasis added). §3302 also not applicable. It states:

> The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for--
> (1) necessary exceptions of positions from the competitive service; and
> (2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title.

Only two executive orders have been passed pursuant to §3302. Both related to the banality of moving certain veterans from competitive service to excepted service. They did not involve imposing medical procedures on employees.

§7301 provides that the President may "prescribe regulations for the conduct of employees in the executive branch." (emphasis added). §7301 is inapplicable on its face because it applies to employee conduct, not medical status. There have been 88 Executive Orders signed pursuant to this section. None involves requiring employees to undergo medical procedures or take pharmaceuticals as a condition of employment.

There is no indication in any of the statutes cited that Congress intended to imbue the President with the authority to order civilian employees to undergo a medical procedure.. Moreover, even if Congress did wish to assign such power to the President, it would have been outside of Congress's ability because it is still a health regulation and as a branch of the federal government Congress is also excluded from exercising police power, which is reserved to the states.

III. The Mandates should be analyzed under strict scrutiny

Even if the Court properly found that the President had the authority to

institute the Employee Mandate under Title V, it erred in applying rational basis analysis to the Mandates. Employees do not lose their fundamental right to bodily integrity by virtue of working for the government, and Courts' "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick v. Myers*, 461 *U.S.* 138, 147 (1983). Mandating that people undergo a medical procedure to be injected with pharmaceuticals is an intrusion on the fundamental right to decline medical procedures. There is no precedent that the President can require the entire federal workforce to undergo a medical procedure to continue employment.

On the contrary, the right of a free and mentally competent person to decline unwanted medical procedures is well-established as essential to the ordered concept of liberty and the individual right to privacy. People have the right to decline even lifesaving medical care. This applies to taking things out of a person's body against their will. *In re A.C.,* 573 A.2d 1235 (D.C. Court of Appeals 1990) (c-section cannot be performed without consent, even to save life of baby); *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. Ct. 1978) (patient cannot be forced to undergo amputation even if they will likely die without it). It applies to putting things into a person's body against their will. *Zant v. Prevatte*, 286 S.E.2d 715 (Ga. 1982) (prisoner right to refuse food), *Erickson v. Dilgard,* 252 N.Y.S. 2d 705 (Special term 1962) (competent adult has liberty to refuse blood transfusion even if it may cause their

death). It applies no matter how unreasonable or illogical the refusal. It applies even if children will be left without a parent. *In re Osborne*, 294 A.2d 372 (D.C. Court of Appeals 1972).

The right to decline medical procedures is fundamental as it falls within the right to bodily integrity under the Fifth and Fourteenth Amendments.[5] *Glucksberg*, 521 U.S. at 720 (stating that the liberty protected by substantive due process includes the right to bodily integrity); *see also, Cruzan*, 497 *U.S.* at 277 (1990) (stating that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment"). Because the Mandates intrude on a fundamental right, they are analyzed under strict scrutiny. *Regents of Univ. of California*, 438 *U.S.* at 357.

The right to exercise personal choice over medical decisions concerning one's body also falls within the privacy interests protected by the substantive due process clause, specifically "the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions." *Doe by & through Doe* v. *Boyertown Area Sch. Dist.,* 897 F.3d 518, 527 (3d Cir.

[5] The Supreme Court has noted that the due process clauses of the 5th and 14th Amendment operate in the same manner. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (stating that "[l]ike its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression") (internal citations omitted).

2018) (citing *Doe v. Luzerne County*, 660 F.3d 169, 175 (3d Cir. 2011)). The Mandates' requirement that people seeking an exception disclose their private medical information and religious beliefs to the government also violates the Workers' fundamental rights to privacy.

Here, the Mandates condition the Workers' employment, and broad employability, on surrendering their constitutional right to decline medical procedures. If they seek an exception they must also share their private medical information and religious beliefs with the government. These conditions on continued employment violate the doctrine of unconstitutional conditions, which prohibits the government from conditioning a benefit or privilege on the surrender of a constitutional right. *Frost v. Railroad Commission of State of California,* 271 *U.S.* 583 (1926). The doctrine applies to government benefits like tax exemptions, unemployment benefits, welfare, and public employment. *Perry v. Sindermann*, 408 *U.S.* 593, 59 (1972) (internal citations omitted).

Because the Mandates condition public employment on the exercise of the Workers' fundamental rights to liberty and privacy, strict scrutiny applies.

IV. The Mandates are unconstitutional under strict scrutiny analysis because they are a substantial burden on the Workers' liberty and privacy rights and are not narrowly tailored

To survive strict scrutiny, the government must demonstrate a compelling government interest and show that the government action is narrowly tailored to

achieve that interest. *Glucksberg*, 521 *U.S.* at 721 (stating that "the Fourteenth Amendment 'forbids the government to infringe... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)).

The government's asserted interests must be balanced and weighed against the seriousness of the intrusions on the Workers' liberty and privacy. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (stating that with balancing, the government interest must be "of sufficient magnitude to override the interest claiming protection"). The policy also must be narrowly tailored to achieve the government's asserted interests.

A. The Government's Asserted Interests

Last year, the Supreme Court stated that "California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020). For purposes of the underlying motion, it was assumed the federal government has this compelling interest, however the Workers noted in a footnote that the government's interest may have diminished since *S. Bay United Pentecostal Church* was decided in light of new treatments, the existence of prophylactics, and much being learned about the virus in the last year and a half. Moreover, *S. Bay*

involved a state pursuing a state interest under its police power. The federal government may not share the same interest. Regardless, even if it is assumed that the government has a compelling interest, the Workers' liberty and privacy rights outweigh the government interest. In addition, the Mandates are not narrowly tailored.

B. The Workers' liberty and privacy rights are stronger and more compelling than the governments' interests and the Mandates are not narrowly tailored

Weighing the government's interest against the serious intrusion on the Workers' liberty and privacy rights shows that the Mandates are unconstitutional.

The Workers' liberty and privacy rights to decline an unwanted medical intervention are extremely strong when: 1) the mandated pharmaceutical's ability to stop infection and transmission is uncertain or unknown; 2) the pharmaceuticals are novel themselves *and* are produced and delivered *via* a novel technology; 3) being injected with the pharmaceuticals carries risk; 4) the CDC's own data shows that the vast majority of people experience symptoms of illness after taking the pharmaceuticals; 5) the pharmaceuticals are all manufactured by corporations with either extensive criminal records and product safety failures or no track record having never brought a product to market before; and 6) the agency tasked with overseeing the safety of the pharmaceuticals has a public image of failing in its mission due to actual high-profile failures to keep people safe.

The government's interest in coercing the medical procedure to stop the spread of a virus is less compelling and lacks narrow tailoring when: 1) there exists a wide range of treatments for the targeted virus; 2) the virus has an objectively low mortality rate, especially among working-age people who are targeted by the Mandates; 3) the federal government has navigated other viruses throughout history without these measures; and 4) the Mandates do not account for natural immunity gained from previous infection, only "vaccination."

Each of these factors is discussed in more detail below.

1. The uncertainty concerning the mandated pharmaceuticals' efficacy and duration of protection weighs against the Mandates

Much is unknown concerning the mandated pharmaceuticals' efficacy and duration of protection. The corporations manufacturing them do not know how long protection lasts. The "Fact Sheets for Recipients and Caregivers" for each pharmaceutical states that "the duration of protection against Covid-19 is currently unknown." *See* Facts Sheet for Pfizer (Appellant's App. at 85-92), Fact sheet for Moderna (Appellant's App. at 93-98), and Fact Sheet for Janssen (Appellant's App. at 99-105).

The government also does not know how long immunity from the mandated pharmaceuticals lasts or their efficacy against new variants. Information is coming out in real time and government officials are even issuing conflicting information at times. For example, in April, CDC Director Dr. Rochelle Walensky stated that data

suggests "[v]accinated people do not carry the virus — they don't get sick." Appellant's App. at 124 (quoting CDC Director Rochelle Walensky). However, a CDC spokesperson walked back the claim later that day stating "[i]t's possible that some people who are fully vaccinated could get Covid-19. The evidence isn't clear whether they can spread the virus to others. We are continuing to evaluate the evidence." *Id.* Three months later, the CDC announced that more recent data shows vaccinated and unvaccinated people carry similar viral loads, which "suggest[s] an increased risk of transmission." *Statement from CDC Director Rochelle P. Walensky, MD MPH on Today's MMWR* (Appellant's App. at 126). Now the CDC and FDA have recommended booster shots for many people and CDC Director Walensky has suggested that the definition of "fully vaccinated" may change from two shots to three shots. Appellants' App. at 128 (quoting CDC Director as stating: "[w]e may need to update our definition of 'fully vaccinated' in the future").

The fact that the efficacy of the pharmaceuticals and duration of protection is unsettled, and may be as short as six months, weighs heavily in favor of people's right to decline being injected with them. The fact that people who have received the mandated pharmaceuticals can still become infected with and transmit Covid-19, undermines any government interest in mandating that the Workers be injected with them as a condition of employment.

2. The experimental and novel nature of the mandated pharmaceuticals and the technology they use favors people's liberty to decline them

The government is mandating that two-thirds of the workforce be injected with novel pharmaceuticals that are still in clinical trials. They have been given to the general population for less than a year. There are no long term studies.

Moreover, they are comprised of a novel technology that uses a person's own cellular machinery to transcribe and translate synthetic genetic material to manufacture a foreign protein. *How the Johnson and Johnson Vaccine Works* (Appellants' App. at 71-82). DNA and mRNA gene therapeutics are an emerging technology with great promise, but this is the first time it is has ever been tested on or used for healthy people. These pharmaceuticals are still investigational and the right to decline novel or experimental pharmaceuticals is a very strong, perhaps inviolable, liberty and human right.

3. The fact that the mandated pharmaceuticals carry risk weighs in favor of the individual liberty to decline it

As part of informed consent, people who take any of the mandated pharmaceuticals are required to be given a "Fact Sheet for Recipients and Caregivers." The Fact Sheets for the Pfizer and Moderna mandated pharmaceuticals list several risks, including myocarditis and pericarditis. The Fact Sheet for the J&J pharmaceutical warns that "[b]lood clots involving blood vessels in the brain, lungs, abdomen, and legs along with low levels of platelets," and Guillian Barre syndrome have occurred in some people. (Appellants' App. at 101-02). The fact sheets for all

the mandated pharmaceuticals state that "Serious and unexpected side effects may occur" and the "vaccine" is "still being studied in clinical trials." *See Fact Sheets* for Pfizer (Appellants' App. at 89); Moderna (Appellants' App. at 95); and Janssen (Appellants' App. at 102).

Notably, the serious injuries of myocarditis, pericarditis, and blood clots were discovered *after* the mandated pharmaceuticals had already been administered to people and people had suffered those injuries. The "other serious side effects [that] may occur" will be discovered by unlucky people in the same manner. There are known and unknown physical risks.

There have also been many reports of girls and women experiencing abnormal vaginal bleeding after receiving the mandated pharmaceuticals. The NIH is researching the cause. *Covid-19 Vaccines and the Menstrual Cycle* (Appellants' App. at 129-30). **Currently the cause is unknown because the mandated pharmaceuticals are still investigational.**

Finally, because the government is treating the mandated pharmaceuticals as vaccines, adverse events are subject to the Vaccine Adverse Event Reporting System ("VAERS") reporting. According to the VAERS website, the system was created by Congress in 1990 as "a national early warning system to detect possible safety problems in U.S.-licensed vaccines."[6] The early warning system is throwing up red

[6] https://vaers.hhs.gov/about.html

flags. People have reported more injuries to VAERS from the mandated pharmaceuticals than all other injuries combined for the entire 21 year history VAERS has existed, more than 894,143 reports as of November 28, 2021, including 18,853 deaths.[7]

There is clearly *some* risk to these pharmaceuticals. The only other instance in which the federal government can force free people to risk the well-being of their body to further a government interest is explicitly granted to the legislative branch of government in the Constitution. Specifically, Congress has the power to raise an army and send that army to war. Other than that, there is no other authority granted to government to intrude on the liberty of a free citizen, not accused of any crime, and require them to do something with their body that carries a risk of death or permanent disability. If a federal government entity wishes to compel people to take a risk with their body the interest must be compelling enough to override the individual liberty and privacy interest to decline the risk.

Here, it is not. Moreover, the urgency of the individual liberty to avoid this risk is heightened because individuals have no recourse against the product manufacturers or the government if they are injured. This is because the

[7] Current compilations of data concerning VAERS reports can be found at https://www.openvaers.com/. It is a website that downloads data from VAERS and reports it exactly as it is on the VAERS website in a more readable format. https://openvaers.com/faq

manufacturers have been granted legal immunity for harm caused by their product under the PREP Act[8] and the government likely has sovereign immunity.

4. The fact that the mandated pharmaceuticals are likely to make individuals ill in the short term weighs in favor of the Workers' liberty to decline them

According to data provided by the CDC, most people experience short-term symptoms of illness after the injections including headache, fatigue, fever, muscle ache and chills. 82.8% of the participants between the ages of 18 and 55 in Pfizer's clinical trials experienced at least one of these symptoms, 81.9% of the Moderna and 61.5% of the J&J participants in that age range. *See* CDC Reports on "Vaccine Reactions and Adverse Events" for Pfizer (Appellants' App. at 108), Moderna (Appellants' App. at 116), and Janssen (Appellants' App. at 120-21).

The fact that an individual is more likely than not to experience symptoms of illness after the procedure favors the individual right to decline the procedure. It is impossible that the Constitution forbids the government from forcing an ill person to take something that will make them well, but permits the government to force someone who is well to take something that will likely make them ill. That would be a logical and moral absurdity.

5. The fact that the mandated pharmaceuticals are manufactured by corporations with either extensive criminal records or no track record at all weighs in favor of the individual right to decline the pharmaceuticals

[8] 42 U.S.C. § 247d-6d

Of the three corporations manufacturing the mandated pharmaceuticals, two of the parent companies (Pfizer and J&J) have extensive track records of criminality, fraud, and product safety issues. The third, Moderna, has no track record at all, having never had a product approved by the FDA.

Pfizer, J&J, and their subsidiaries have pled guilty to felony and misdemeanor criminal violations of an astonishing range of statutes including the Food, Drug and Cosmetics Act, the False Claims Act, and the Foreign Corrupt Practices Act. A jury also found that Pfizer violated the Racketeering Influenced and Corrupt Organizations Act. Pfizer's underlying criminal and unethical actions include (but are not limited to): feloniously misbranding drugs with intent to defraud or mislead, illegally promoting drugs, submitting false claims to the government, paying kickbacks to doctors, withholding evidence about faulty medical products, falsifying records to cover up unsafe manufacturing practices, and testing an experimental drug on children in Nigeria. *See* Appellants' App. at 131-140. In addition to criminality, Pfizer has been the subject of many high-profile drug safety scandals, most famously Bextra and Celebrex, which were both recalled due to safety issues.

J&J and its' subsidiaries' records of criminality and deception may exceed Pfizer's. Highlights include: causing children's medicine contaminated with metal to enter commerce and attempting to cover up the contamination without informing the public, obstructing justice and "corruptly persuading others" to shred evidential

documents, numerous instances of illegally marketing drugs, submitting false claims to the government, and paying kickbacks to doctors, pharmacists, and nursing homes. *See* Appellants' App. at 141-152.

The shocking and criminal backgrounds of these corporations weighs in favor of the individual liberty to decline being injected with products they manufacture.

6. The fact that the federal agency tasked with ensuring pharmaceutical safety is plagued by scandals and failures directly related to the agency's ability to protect the public from unsafe pharmaceuticals favors the individual liberty to decline the mandated pharmaceuticals

Whistleblowers, industry experts, and even U.S. Senators have been warning the public for more than a decade that the FDA is not working properly. High profile drug recalls, high profile jury verdicts, and daytime television commercials that begin with the phrase "Have you or a loved one been injured by [FDA-approved pharmaceutical]?" reflect this reality in everyday life.

In 2007, Senator Chuck Grassley testified before the House Oversight Committee concerning what he had learned in his oversight of the FDA while Chairman of the Senate Finance Committee. His testimony details ineptitude and perversion of purpose. He identified four "systemic" problems with the FDA:

> First, scientific dissent is discouraged, quashed, and sometimes muzzled inside the Food and Drug Administration. Second, the FDA's relationship with drug makers is too cozy. The FDA worries about smoothing things over with industry much more than it should with its regulatory responsibilities. Third, inside the FDA there's widespread fear of retaliation for speaking up about

> problems. And fourth, the public safety would be better served if the agency was more transparent and forthcoming about drug safety and drug risks.

Statement of U.S. Senator Chuck Grassley of Iowa, Appellants' App. at 155.

The corruption of the pharmaceutical industry and failures of the FDA are so notorious that the Edmund J. Safra Center for Ethics at Harvard University sponsored a fellowship for Dr. David W. Light that specifically focused on researching "the historical roots of institutional corruption in the development of prescription drugs and its consequences." *Edmond J. Safra Center of Ethics informational page for Donald Light* (Appellants' App. at 158). In his year there, Dr. Light wrote prolifically on various topics concerning corruption in the pharmaceutical sector, including the FDA. In one article titled "Risky Drugs: Why The FDA Cannot Be Trusted," Dr. Light argued that financial conflicts of interest have had a corrupting influence on the FDA:

> since the [pharmaceutical] industry started making large contributions to the FDA for reviewing its drugs, as it makes large contributions to Congressmen who have promoted this substitution for publicly funded regulation, the FDA has sped up the review process with the result that drugs approved are significantly more likely to cause serious harm, hospitalizations, and deaths…This evidence indicates why we can no longer trust the FDA to carry out its historic mission to protect the public from harmful and ineffective drugs.

Appellants' App. at 159. Dr. Light closes the article with advice to readers that "[e]xperienced, independent physicians recommend not to take a new drug approved

by the FDA until it is out for 7 years, unless you have to, so that evidence can accumulate about its real harms and benefits." *Id.* at 161.

Many people have personally been hurt by FDA failures, including Plaintiff Maribel Lorenzo. *Amended Verified Complaint*, ECF 2 at ¶94. Enough information has percolated to the surface of public awareness through personal experience and prominent whistleblowers that it is reasonable for people to distrust the federal agency's ability to keep people safe from harmful pharmaceuticals. The question is not whether Senator Grassley and Dr. Light are correct about the FDA, rather it is whether people are free to believe that they are correct and make decisions about their own bodies accordingly. Are they free to follow Dr. Light's advice? People have the liberty to distrust the FDA in their minds and should not be coerced by the government to submit their bodies against their will based on the actions of the very federal agency they distrust.

7. The Mandates' failure to account for natural immunity shows that the Mandates are not narrowly tailored

People who recover from Covid-19 develop robust and broad immunity that protects them from reinfection. A study funded by the National Institute of Health and National Cancer Institute and published in the journal Science found that "more than 95% of people who recovered from COVID-19 had durable memories of the

virus up to eight months after infection." *Lasting immunity found after recovery from Covid-19*, (Appellants' App. at 162-165).

The concept of immunity is totally absent from both the Employee Mandate and the Contractor Mandate. In fact, the words "immune" and "immunity" do not appear once in either Mandate or in the President's speech announcing the Mandates. The fact that people who become sick from a virus and subsequently recover develop natural immunity is well-established. Indeed, in 1997, a New Jersey District Court acknowledged, under a section the Judge titled "Basic Principles of Virology" that

> When a higher organism such as an animal or human is exposed to a virus and its cells become viral hosts, the animal or human develops a natural immunity. This immune response operates at two levels: first, at the initial stage of the infection before the virus has invaded the host and second, after the virus has invaded. When the virus stimulates certain specialized cells, these cells produce antibodies which prevent future infection.

Boehringer Ingelheim Animal Health, Inc. v. Schering-Plough Corp., 984 F. Supp. 239, 243 (D.N.J. 1997). The federal government's choice to ignore natural immunity does not negate this basic principle of virology. *See also BST Holdings LLC*, 2021 WL5279381 at *6 (stating that an example of the OSHA Mandate being overbroad is that "a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus").

8. The wide range of treatments available for Covid-19 undermines the government's interests and shows that the Mandates are not narrowly tailored

Most people who contract Covid-19 require no treatment and are given no treatment. For people who need treatment, there are no fewer than eight FDA authorized treatments available.[9] The availability of multiple treatments undermines the government's interest in mandating a prophylactic pharmaceutical of questionable efficacy.

9. Covid-19's low infection fatality rate even without treatment, weighs in favor of The Workers' liberty and privacy rights to decline the medical procedure

To balance the state and individual interests, it is not necessary to know the exact infection mortality rate of Covid. Viruses have a range of mortality rates ranging from 100% fatal (rabies) to essentially zero. Smallpox had a mortality rate of up to 30%. The government's interest in stemming the spread of viruses through coerced medical procedures is logically more compelling with more fatal viruses and less compelling with less fatal viruses.

The CDC has not released an estimated infection fatality rate for Covid-19 or, if it has, it's very hard to find. However, the World Health Organization Bulletin, a peer reviewed journal, published a study that found that "the infection fatality rate

[9] A list of currently authorized treatments is available on the FDA, Emergency Use Authorization Website (listing authorized therapeutics under Drug and Biological Therapeutic Products, available at https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#Coviddrugs (last accessed September 7, 2021)

of COVID-19...ranged from 0.00% to 0.31% (median 0.05%)" for people under 70. *Infection fatality rate of Covid-19 inferred from seroprevalance data*, (Appellants' App. at 166). Even if these numbers are not exact, it is clear Sars-Cov2 is on the low end of virus mortality, which weighs in favor of the Workers' right to decline the Mandated pharmaceuticals.

The President's Mandates are unprecedented in the history of the United States. For such extreme government action, the government interest must be compelling enough to justify it. Here it is not. Covid has a low mortality rate among working age people, the people who are impacted by the Mandates. If the government can compel people to undergo a novel experimental medical procedure to prevent the spread of a virus that 99.7% percent of people under 70 survive, then the government holds the power to coerce people to undergo novel medical procedures for nearly any disease that exists, or is yet to emerge, that carries even a small risk of mortality to others. This power is not granted to the federal government in the Constitution, and the individual liberty to decline such coerced medical procedures is protected by the substantive due process clause of the Fifth Amendment.

10. The fact that the government has navigated other viruses without mandating medical procedures and medical surveillance undermines the government's interests and shows the Mandates are not narrowly tailored

There is ample precedent for protecting the federal workforce from respiratory

viruses and other diseases with measures that do not violate the Constitution. In the 232 years since the Constitution was ratified many viral diseases, new and old, have swept the country and the federal government has navigated all of those without ever coercing the federal workforce and private sector workers to be injected with a novel and experimental pharmaceutical. The President's Mandates are not narrowly tailored because history proves they are not necessary. Moreover, the President's own words undermine the need for these Mandates. He stated: "The path ahead, even with the Delta variant, is not nearly as bad as last winter." *The President's Speech*, (Appellants' App. at 66). It is also further demonstrated by the fact that the three federal employees have worked in person without a vaccine or testing for most or all of the pandemic.

V. The District Court erred in holding that it did not have jurisdiction over Ms. Lorzenzo's request for an injunction

Ms. Lorenzo's claim presents an issue of first impression: Who should an employee enjoin when her employer has entered into a contract with the federal government, at the order of the President, concerning her body?

The Contractor Mandate orders federal agencies to condition its contracts on the contractor agreeing to condition its employees' continued employment on undergoing a medical procedure. The path to enjoinment is not simple, but Ms. Lorzenzo's claims are redressable.

The District Court found that it lacked jurisdiction over Ms. Lorenzo's claim

because she "provides no legal authority by which this Court could grant injunctive relief against the President because she cannot determine the proper defendant against whom to bring suit." This was error because the Court's power to provide injunctive relief is one in equity, and "[a]t the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Ms. Lorenzo's claim is redressable under the Administrative Procedures Act and *Fed. R. Civ. P*. 65.

Under *Fed. R. Civ. P.* 65(d)(2)(c), the District Court has authority to enjoin "other persons who are in active concert or participation" with the parties. Here, whatever federal agencies have contracts with Ms. Lorenzo's employers are in active concert or participation with the President; they are subordinate to him, so they can be enjoined. Moreover, all agency heads would be represented by the federal government and the federal government was on notice of the claims and had an opportunity to brief them. While the specific legal argument concerning the Court's ability to enjoin non-parties pursuant to *Fed. R. Civ. P*. 65 was not raised below, the motion was made under the Rule 65, the government was on notice of the request for an injunction, it is equitable to order the government to disclose the agencies that have entered into a contract with Ms. Lorenzo's employer concerning her body, and it is equitable to enjoin the heads of those agencies from enforcing Executive Order

14042.

Under the Administrative Procedure Act, 5 *U.S.C. §702* "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." However, the "injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance." Thus, the government can be enjoined from enforcing its end of the contract concerning Ms. Lorenzo's body by naming the agencies and offices that are responsible for enforcement in the injunctive decree under 5 *U.S.C.* 702 and *Fed. R. Civ. P.* 65.

Under the Mandate's scheme, the federal government uses Ms. Lorzenzo's employer as both a sword for government action and shield against individuals who wish to challenge the government action. As a sword, the government recruits Ms. Lorenzo's employer to condition her employment on undergoing medical procedures the government wants her to undergo. Forcing Ms. Lorenzo to sue her employer directly to enjoin the Mandate would allow the government to also use her employer as a shield. Ms. Lorenzo should be able to enjoin the government directly because it is the source of her injury. To obtain full relief, the government should be ordered to identify with what agencies her employer contracts and those agencies should be enjoined.

In the alternative, and in the interest of judicial efficiency, it is possible to enjoin the President. The Supreme Court has specifically left the door open as to whether the President may be compelled to perform a ministerial duty. *Franklin v. Massachusetts*, 505 *U.S.* 788, 802 (1992). Moreover, the prohibition on enjoining the President is related to the "performance of his official duties." *Id.* These Mandates are outside the President's power. They are unconstitutional and are therefore *not* related to the performance of his official duties.

There are, thus, at least two roads by which Ms. Lorenzo's claims can be adjudicated and the injuries to her enjoined.

VI. Granting the injunction will preserve the status quo, prevent irreparable harm to the workers, will not result in irreparable harm to the President or the government, and will serve the public good

An injunction would simply preserve the status quo while the constitutionality of the Mandates is considered by the federal courts. It should be granted here because it will prevent irreparable harm to the Workers and will not result in irreparable harm to the government.

There is no irreparable harm to the government in enjoining the Mandates because "the Government does not have an interest in the enforcement of an unconstitutional law." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013); *see also BST Holdings* 2021 WL5279381 at *8 (stating that "[a]ny interest OSHA may claim in enforcing an unlawful (and likely unconstitutional) ETS

is illegitimate"). Moreover, there are alternative and constitutional methods that the government has at its disposal to achieve its interest of stopping the spread of Covid.

In contrast, the likelihood of irreparable harm to the Workers is immense. The Mandates require the Workers to undergo an irreversible medical procedure that carries risk or lose their jobs and become effectively disqualified from two-thirds of American jobs. Either outcome constitutes irreparable harm because both violate the doctrine of unconstitutional conditions, which prohibits government coercion. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (recognizing that the issue in constitutional conditions cases is "coercion"). The coercion is the harm. If the Workers submit to the government coercion, what is done to their bodies cannot be undone. If an individual submits to the coercion and is injured by the pharmaceuticals, which do carry risk, any route of monetary recovery leads to actors that are immunized from liability. In addition, if the Mandate is later found to be unconstitutional, there is no adequate remedy at law for the harm done from the coercion and having been forced to comply with an unconstitutional intrusion on their bodies and privacy.

Enjoining the Mandates is also in the public interest. The Mandates create two classes of people based on medical status, and then relegate the disfavored class into an underclass for which it is difficult to earn a livelihood. Allowing this caste system to go into effect would constitute irreparable harm, not just to the Workers, but to

the country. The public interest is served in preserving the status quo. *See Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.,* 42 F.3d 1421, 1427 (3d Cir. 1994) (noting that "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff").

CONCLUSION

The Executive Orders are unconstitutional. The President does not have any constitutional authority for the Mandates and Congress has not, and could not, delegate any such power to the President because Congress also lacks police power.

In addition, the Mandates are a massive intrusion on workers' rights to liberty and privacy, recognized by the substantive due process clause of the Fifth Amendment. Under strict scrutiny they are plainly unconstitutional.

The Mandates have already worked irreparable harm and will continue to work irreparable harm as long as they continue.

For the foregoing reasons, it is respectfully requested that the Court enter an order reversing the District Court's denial of the Workers' request for a preliminary injunction and remanding for the following actions:

1) Expediting the Workers' motion for leave to Amend the Complaint;
2) Granting the Workers' motion to Amend the Complaint;

3) Enjoining the Department of Justice and Social Security Administration from enforcing Executive Order 14043;

4) Ordering the government to compile a list of all federal agencies that contract with Horizon BlueCross BlueShield;

5) Enjoining all disclosed federal agencies that hold contracts with Horizon BlueCross BlueShield from executing any contract addendums required by Executive Order 14042 and enjoining the federal agencies from enforcing the Executive Order as to any contracts that have already incorporated the clause required by Executive Order 14042;

OR in the alternative;

Enjoining President Biden and the United States government from enforcing Executive Orders 14042 and 14043.

Respectfully submitted,

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BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: November 28, 2021

COMBINED CERTIFICATIONS

I, Dana Wefer, counsel for the Plaintiffs/Appellants hereby certify as follows:

1) I am a member of the Bar of the Third Circuit Court of Appeals;
2) The brief complies with the word county and typeface requirements set forth in Federal Rule of Appellate Procedure 27. The word count of this electronic brief is 11,807 words and is typed in Times New Roman font, 14-point type.
3) The brief and associated motions to expedite and for an emergency stay will be served on the government contemporaneously by filing with ECF;
4) The electronic brief and paper copies of the briefs are identical;
5) This brief and all associated documents were run through Windows Security Virus & Threat detection software on November 28, 2021 before uploading. No threats were found.

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: November 28, 2021